Sunrise Home Goods (M) Sdn Bhd v Ketua Pengarah Kastam & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–73–12 OF 2022
AHMAD KAMAL J
2 JANUARY 2024

Customs and Excise — Duty — Anti-dumping duties — Appellant had Customs licence to have manufacturing warehouse ('LMW') where it stored imported raw materials to manufacture kitchen sinks — Customs Department issued bill of demand ('BOD') to appellant to pay substantial amount in unpaid anti-dumping duties on imported raw materials — BOD was issued based on internal departmental circular that LMWs were not entitled to suspension/exemption from payment of anti-dumping duties — Whether circular had no force of law and could not displace Customs legislation and rules granting LMWs exemption from payment of anti-dumping duties

The appellant was in the business of making kitchen sinks for export and used stainless-steel plates imported from China in its manufacturing process. The appellant was licensed under the Customs Act 1967 to maintain a bonded warehouse ('LW') and manufacturing warehouse ('LMW') where the imported plates could be stored without payment of customs duties pending their use in the production of the finished products. Under an internal circular dated 3 November 2016, addressed to all branches of the Customs Department and to the Federation of Malaysian Manufacturers ('FMM'), of which the appellant was a member, the first respondent ('R1') declared that LMW licencees were not entitled to suspension/exemption from payment of anti-dumping duties. An audit carried out by Customs revealed that the appellant had not paid anti-dumping duties amounting to RM1,178,075.63 on the imported stainless-steel plates. A bill of demand ('BOD') was issued to the appellant for payment of the said sum. The appellant appealed to the Customs Appeal Tribunal ('the tribunal') against the BOD but the appeal was rejected. The appellant then filed the instant originating summons ('OS') to set aside both the tribunal's decision and R1's decision to impose the BOD. The appellant argued that R1 could not by a mere circular/letter arbitrarily impose a condition that LMW licencees were not entitled to suspension/exemption from payment of anti-dumping duties. In response, the respondents contended that the appellant could not claim such entitlement when no order to that effect affecting LW and LMW licensees had been made by the Minister concerned under the Countervailing and Anti-Dumping Duties Act 1993 ('Act 504').

Held, allowing the appellant's OS:

(1) Reading s 2(1) of the Customs Act and Item 85 in the Schedule to the Customs Duties (Exemptions) Order 2017, together with Act 504 and the Customs Regulations of 1977 and 2019, it was clear that the appellant as an LMW licensee enjoyed suspension from payment of customs duties under the Customs Act and exemption from payment of customs duties under the Customs Duties (Exemptions) Order. Under s 2(1) of the Customs Act, 'customs duty' included anti-dumping duties under Act 504. Section 34(1) of Act 504 also provided that the Customs Act and Act 504 shall be construed as one (see paras 8, 18 & 22–25).

(2) Customs duties exemption/suspension was also reflected in the following: (a) the Customs' website on LWs stated that payment of duty and taxes for dutiable goods warehoused at LWs were deferred until the goods were released for home consumption or for re-export; and (b) the MITI's website on LMW stated that raw materials and components warehoused in the LMW and used directly in the manufacturing of approved goods were exempt from customs duty (see para 21).

(3) Customs was bound by all written laws and could not arbitrarily re-write the law by its circular/letter to disallow the appellant from the anti-dumping duties exemption granted by the MOF in the exercise of its statutory discretion (see para 26).

(4) The *Hansard* of the *Dewan Rakyat* third Parliament's second session on 6 December 1972 clearly reflected Parliament's intention to facilitate LMW licensees to carry out manufacturing activities using imported raw materials in an effort to encourage and incentivise export-oriented industries. It was clear from the *Hansard* that Parliament intended to suspend/exempt customs duties on all goods imported into LW and LMW to encourage the growth of export-oriented industries. The legislative intent to suspend/exempt anti-dumping duties for LW and LMW licensees was clearly expressed in the legislations and the *Hansard*. Both Customs and the tribunal had a duty to uphold and give effect to Parliament's intention. Any deviation from this duty undermined the integrity of the legislative process (see paras 9–11, 14, 32 & 65–66).

(5) It was clearly the Minister who was empowered under the Customs Act to decide the type of customs duties qualified for exemption and there was no evidence that the Minister had delegated such power to Customs. The tribunal therefore erred in holding that Customs could, by way of its circular, impose a legal condition that overrode the statutory exemption given to LW and LMW licensees from payment of anti-dumping duties. The circular/letter was not issued pursuant to any express provision of the Customs Act and had no force of law (see paras 38–39, 42 & 44).

(6) The BOD to the appellant was issued on the basis that it had committed an offence under s 133(1)(a) of the Customs Act. Customs could not by way of a circular/letter to FMM create a legal condition, the breach of which attracted a criminal sanction under the said provision. Customs had no legislative power to create conditions that could result in penal sanction. The appellant was only bound to observe the conditions stipulated in its licences and not in any circular or letter issued by Customs. The actions of the respondents in disallowing the appellant's entitlement to suspension/exemption from anti-dumping duties was therefore unreasonable, arbitrary and ultra vires (see paras 48–49, 54 & 62–63).

[Bahasa Malaysia summary

Perayu menjalankan perniagaan membuat sinki dapur untuk pengeksportan dan menggunakan plat keluli tahan karat yang diimport dari China dalam proses pembuatannya. Perayu telah dilesenkan di bawah Akta Kastam 1967 untuk menyelenggara gudang berikat ('GB') dan gudang pembuatan ('GP') di mana plat yang diimport boleh disimpan tanpa pembayaran duti kastam sementara menunggu penggunaannya dalam pengeluaran produk siap. Di bawah pekeliling dalaman bertarikh 3 November 2016, yang ditujukan kepada semua cawangan Jabatan Kastam dan kepada Persekutuan Pekilang Malaysia ('PPM'), di mana perayu adalah ahli, responden pertama ('R1') mengisytiharkan bahawa pemegang lesen GP tidak berhak mendapat penggantungan/pengecualian daripada pembayaran duti anti-lambakan. Pengauditan yang dijalankan oleh Kastam mendapati perayu tidak membayar duti anti lambakan berjumlah RM1,178,075.63 ke atas plat keluli tahan karat yang diimport. Bil tuntutan ('BT') telah dikeluarkan kepada perayu untuk pembayaran jumlah tersebut. Perayu merayu kepada Tribunal Rayuan Kastam ('tribunal') terhadap BT tetapi rayuan itu ditolak. Perayu kemudiannya memfailkan saman pemula semasa ('SP') untuk mengetepikan kedua-dua keputusan tribunal dan keputusan R1 untuk mengenakan BT. Perayu berhujah bahawa R1 tidak boleh hanya melalui pekeliling/surat sewenang-wenangnya mengenakan syarat bahawa pemegang lesen GP tidak berhak untuk penggantungan/pengecualian daripada pembayaran duti anti-lambakan. Sebagai balasan, responden berhujah bahawa perayu tidak boleh menuntut kelayakan tersebut apabila tiada perintah yang memberi kesan kepada pemegang lesen GB dan GP telah dibuat oleh Menteri berkenaan di bawah Akta Duti Timbal Balas dan Anti-Lambakan 1993 ('Akta 504').

Diputuskan, membenarkan SP perayu:

(1) Membaca s 2(1) Akta Kastam dan Perkara 85 dalam Jadual Perintah Duti Kastam (Pengecualian) 2017, bersama Akta 504 dan Peraturan-Peraturan Kastam 1977 dan 2019, ia adalah jelas bahawa perayu sebagai pemegang lesen GP menikmati penggantungan daripada

pembayaran duti kastam di bawah Akta Kastam dan pengecualian daripada pembayaran duti kastam di bawah Perintah Duti Kastam (Pengecualian). Di bawah s 2(1) Akta Kastam, 'duti kastam' termasuk duti anti-lambakan di bawah Akta 504. Seksyen 34(1) Akta 504 juga memperuntukkan bahawa Akta Kastam dan Akta 504 hendaklah ditafsirkan sebagai satu (lihat perenggan 8, 18 & 22–25).

(2) Pengecualian/penggantungan duti kastam juga ditunjukkan dalam perkara berikut: (a) laman web Kastam di GBs menyatakan bahawa pembayaran duti dan cukai untuk barang berduti yang disimpan di GBs telah ditangguhkan sehingga barang dikeluarkan untuk kegunaan rumah atau untuk eksport semula; dan (b) laman web MITI di GP menyatakan bahawa bahan mentah dan komponen yang disimpan di GP dan digunakan secara langsung dalam pembuatan barangan yang diluluskan adalah dikecualikan daripada duti kastam (lihat perenggan 21).

(3) Kastam terikat dengan semua undang-undang bertulis dan tidak boleh sewenang-wenangnya menulis semula undang-undang melalui pekeliling/suratnya untuk tidak membenarkan perayu daripada pengecualian duti anti-lambakan yang diberikan oleh MOF dalam melaksanakan budi bicara statutorinya (lihat perenggan 26).

(4) *Hansard* Persidangan Kedua Dewan Rakyat Parlimen Ketiga pada 6 Disember 1972 jelas menggambarkan hasrat Parlimen untuk memudahkan pemegang lesen GP menjalankan aktiviti pembuatan menggunakan bahan mentah yang diimport dalam usaha menggalakkan dan memberi insentif kepada industri berorientasikan eksport. Ia adalah jelas daripada *Hansard* bahawa Parlimen berhasrat untuk menggantung/mengecualikan duti kastam ke atas semua barangan yang diimport ke GB dan GP untuk menggalakkan pertumbuhan industri berorientasikan eksport. Hasrat perundangan untuk menggantung/mengecualikan duti anti-lambakan bagi pemegang lesen GB dan GP telah dinyatakan dengan jelas dalam perundangan dan *Hansard*. Kedua-dua Kastam dan tribunal mempunyai kewajipan untuk menegakkan dan melaksanakan hasrat Parlimen. Sebarang penyelewengan daripada kewajipan ini menjejaskan integriti proses perundangan (lihat perenggan 9–11, 14, 32 & 65–66).

(5) Ia adalah jelas Menteri yang diberi kuasa di bawah Akta Kastam untuk memutuskan jenis duti kastam yang layak untuk dikecualikan dan tidak ada keterangan bahawa Menteri telah menurunkan kuasa tersebut kepada Kastam. Oleh itu, tribunal terkhilaf dalam memutuskan bahawa Kastam boleh, melalui pekelilingnya, mengenakan syarat undang-undang yang mengatasi pengecualian berkanun yang diberikan kepada pemegang lesen GB dan GP daripada pembayaran duti anti-lambakan. Pekeliling/surat itu tidak dikeluarkan menurut mana-mana peruntukan nyata Akta Kastam dan tidak mempunyai kuasa

undang-undang (lihat perenggan 38–39, 42 & 44).

(6) BT kepada perayu telah dikeluarkan atas dasar bahawa ia telah melakukan kesalahan di bawah s 133(1)(a) Akta Kastam. Kastam tidak boleh melalui pekeliling/surat kepada PPM mewujudkan syarat undang-undang, yang pelanggarannya akan dikenakan sekatan jenayah di bawah peruntukan tersebut. Kastam tidak mempunyai kuasa perundangan untuk mewujudkan syarat yang boleh mengakibatkan sekatan keseksaan. Perayu hanya terikat untuk mematuhi syarat-syarat yang ditetapkan dalam lesennya dan bukan dalam mana-mana pekeliling atau surat yang dikeluarkan oleh Kastam. Tindakan responden yang tidak membenarkan perayu mendapat penggantungan/pengecualian daripada duti anti-lambakan adalah tidak munasabah, sewenang-wenangnya dan ultra vires (lihat perenggan 48–49, 54 & 62–63).]

Cases referred to

Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428; [2005] 2 MLRA 335; [2005] 4 CLJ 810, CA (refd)

Ketua Pengarah Hasil Dalam Negeri v Firgos (M) Sdn Bhd [2014] 1 MLJ 701; [2013] MLRHU 876; [2014] 8 CLJ 943; [2014] 1 AMR 176, HC (refd)

Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94; [1996] 2 MLRA 194; [1997] 1 CLJ 636; [1997] 1 AMR 997, FC (refd)

Multi-Purpose Holdings Berhad v Ketua Pengarah Hasil Dalam Negeri [2006] 2 MLJ 498; [2006] 1 MLRA 40; [2006] 1 CLJ 1121 (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265; [2004] 1 MLRA 137; [2004] 4 AMR 202, FC (refd)

Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals [2017] 2 MLJ 421; [2017] 2 MLRA 595, FC (refd)

Seruntum Maju Sdn Bhd v Pengarah Kastam Negeri Perak Jabatan Kastam Diraja Malaysia & Anor [2020] 6 MLJ 401; [2020] MLRAU 195, CA (folld)

Transocean Drilling Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2022] MLJU 2541; [2022] MLRHU 2089; [2022] 1 LNS 2438, HC (refd)

Legislation referred to

Countervailing and Anti-Dumping Duties Act 1993 ss 30(5), 34(1)
Customs Act 1967 ss 2, 2(1), 14(1), 65, 65(1), (2), 65A, 65A(1A), (2), 65D(2), 133(1)(a)
Customs Duties (Exemptions) Order 2017 Schedule, item 85, para 2(1)
Customs Regulations 1977 (repealed by Customs Regulation 2019) reg 50
Customs Regulations 2019 regs 31(b), 50
Delegation of Powers Act 1956
Income Tax Act 1967 s 112(1)

Interpretation Acts 1948 and 1967 s 17A

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Nor Jamilah Shuhadah bt Tohet (Senior Federal Counsel, Royal Malaysian Customs Department) for the respondents.

Ahmad Kamal J:

INTRODUCTION

[1] The appellant is appealing against the decision of the second respondent (the Customs Appeal Tribunal) ('tribunal') in respect of Appeal No MOF.TRK.700-6/1/8 (2021) dated 7 November 2022 which dismissed the appellant's appeal against the decision of the first respondent ('Customs') in the form of a bill of demand dated 4 May 2021 in relation to the anti-dumping duties allegedly underpaid by the appellant.

[2] The appellant filed an originating summons ('OS') dated 2 December 2022 (encl 1) primarily seeking the following reliefs:

(a) that this appeal be allowed, whereas the decision of the second respondent ('tribunal') regarding Appeal No MOF.TRK.700-6/1/8 (2021) dated 7 November 2022 ('tribunal decision') be set aside;

(b) that the decision of the first respondent ('Customs') in the form of a bill of demand dated 4 May 2021 in relation to the anti-dumping duties allegedly underpaid by the appellant be set aside;

(c) that all payments made by the appellant for the said bill of demand dated 4 May 2021 be fully refunded by the Customs to the appellant;

(d) costs; and

(e) any other and further relief that this honourable court deems fit and proper.

[3] After the hearing, I allowed the appellant's OS (encl 1). Here are the grounds for my decision.

BACKGROUND FACTS

[4] The background facts gathered from the cause papers, affidavit in support and submissions of the parties are largely undisputed and can be summarised as follows:

(a) the appellant's principal business is to manufacture kitchen sinks ('products') solely for export mainly in the United States. To

manufacture the products, the appellant uses, amongst others, imported stainless-steel plates from Jiangmen XHHL Stainless Steel Manufacturing Co Ltd ('Jiangmen XHHL'), a company located in Guangdong, China. These stainless-steels plates were imported under the tariff code or harmonised system ('HS') code of 7219.33.0000;

(b) the appellant has a licensed (ie bonded) warehouse ('LW') under s 65 of the Customs Act and a licensed (ie bonded) manufacturing warehouse (LMW) under s 65A of the Customs Act;

(c) as an LMW licensee, the appellant is automatically also a licensed warehouse ('LW') under s 65(1) Customs Act ('LW licensee'). The appellant is entitled to suspension/exemption on customs duties for the imported raw materials upon depositing the materials into its licensed (ie bonded) warehouse;

(d) under the definition of the words 'licensed warehouse', 'dutiable goods' and 'customs duty' under s 2(1) of the Customs Act, this suspension/exemption from Customs duties enjoyed by the appellant expressly includes suspension/exemption from anti-dumping duties. Accordingly, the appellant did not pay any anti-dumping duties on the imported stainless-steel plates;

(e) under an internal circular/letter dated 3 November 2016 ('Customs circular'), the Customs imposed a legal condition on all LMW licensees (including the appellant) that an LMW licensee does not enjoy suspension/exemption for anti-dumping duties;

(f) the purported condition had been communicated to the appellant through the Customs' letter to the Federation of Malaysian Manufacturers ('FMM') dated 9 January 2016 (letter to FMM);

(g) it is a fact not disputed that:

(i) the Customs circular does not purport to impose any conditions on LMW licensees, but rather sets out Customs' interpretation of the law;

(ii) the Customs circular was not written to the appellant, but to other Customs departments, and forwarded to the President of FMM by the letter to FMM issued some two years before the issuance of the LMW license to the appellant; and

(iii) the LMW licence issued to the appellant neither contains this nor any similar condition, nor does it refer to the Customs circular/letter to FMM;

(h) on 2 December 2020 and 6 January 2021, the State Customs of Perlis conducted an audit on the appellant and found out that the appellant has underpaid anti-dumping duties at the rate of 23.95% for the

importation of the stainless-steel plates from China for 2018 until December 2020 under the Anti-Dumping Duties Act and Schedule of Customs (Anti-Dumping Duties) Order 2018;

(i) on 4 May 2021, a bill of demand ('BOD') was issued to the appellant claiming the anti-dumping duties amounting to RM1,178,075.63;

(j) the appellant then filed an appeal to the Tribunal No MOF.TRK.700-6/1/8(2021). On 7 November 2022, the appeal has been dismissed by the tribunal; and

(k) aggrieved by the decision of the tribunal, the appellant filed this OS to challenge the same.

[5] The grounds in support of this application are as follows:

(a) the tribunal committed errors of law by:

(i) failing to apply the Court of Appeal's decision in *Seruntum Maju Sdn Bhd v Pengarah Kastam Negeri Perak Jabatan Kastam Diraja Malaysia & Anor* [2020] 6 MLJ 401; [2020] MLRAU 195 which held that the phrase 'specify in the licence' means 'to mention explicitly, definitely and certainly in the licence'. Conditions must be unambiguously particularised and identified in the licence when the licence is granted or issued to the appellant and no conditions can be imposed after that;

(ii) maintaining Customs' bill of demand dated 4 May 2021 which was issued based on a purported condition imposed on the appellant via Customs' internal letter dated 3 November 2016 and Customs' letter to FMM dated 9 December 2016 that licensed manufacturing warehouses do not enjoy exemption for anti-dumping duties; and

(iii) failing to interpret ss 2(1), 65 and 65A of the Customs Act 1967 ('the Customs Act') correctly and wrongly decided that the appellant must pay the anti-dumping duties as the appellant did not obtain an exemption for anti-dumping duties imposed under the Countervailing and Anti-Dumping Duties Act 1993 ('the Anti-Dumping Duties Act');

(b) the tribunal failed to give any consideration or to give sufficient due consideration that:

(i) as a licensed warehouse and a licensed manufacturing warehouse under ss 65 and 65A of the Customs Act, the appellant is entitled to enjoy suspension of all customs duties imposed. The definition of customs duties includes anti-dumping duties imposed under the Anti-Dumping Duties Act;

(ii) Customs is not empowered under the Customs Act or the Anti-Dumping Duties Act to restrict/limit the definition of customs duties;

(iii) the purported condition imposed by Customs has never been specified in the relevant licences issued to the applicant under ss 65 and 65A of the Customs Act. In this regard, the purported condition does not fulfil the legal requirement 'to mention explicitly, definitely and certainly in the licence';

(iv) the BOD was issued solely based on the Custom's own interpretation and/or internal policy stated in the letters. The letters have no force of law and contradict with the express provisions in the Customs Act and the Anti-Dumping Duties Act; and

(v) the purported condition stated in the letters has never been sent by Customs to the appellant;

(c) the tribunal failed to decide that the appellant has a legitimate expectation that the Court of Appeal's decision in *Seruntum Maju* and the other express provisions would be adhered to and applied by Customs.

The respondents' submission

[6] In gist, the respondents submit as follows:

(a) anti-dumping duties are not suspended/exempted under the Customs Act. The prevailing law relating to anti-dumping duties is the Anti-Dumping Duties Act, which does not provide for the suspension/exemption of anti-dumping duties for LW and LMW. In this regard, ss 65 and 65A of the Customs Act are irrelevant;

(b) there is no order under the Anti-Dumping Duties Act that suspends/exempts the anti-dumping duties for LW and LMW. Any termination, exemption, or suspension of anti-dumping duties imposed lies with the Minister of International Trade and Industry ('MITI') and Minister of Finance ('MOF');

(c) relying on s 30(5) of the Anti-Dumping Duties Act, the definition of 'customs duty' under s 2(1) of the Customs Act should be read restrictively, only for the purposes of authorising Customs to collect anti-dumping duties;

(d) according to para 7 of the condition attached to the licences, which states that the appellant is not exempted from 'its obligations under other written law related to its business', the appellant is subject to the

Anti-Dumping Duties Act and not exempted from the anti-dumping duties on the imported stainless-steel plates; and

(e) it is a standard practice between Customs and FMM that the letter to FMM is sufficient notice, and it is the responsibility of FMM to circulate the said letter to its members.

THE DECISION OF THE COURT

The appellant enjoys suspension/exemption from payment of anti-dumping duties

[7] This court is of the view that the tribunal had erred in holding that as an LMW licensee, the appellant does not enjoy suspension/exemption for anti-dumping duties.

[8] An LMW licensee (who also possesses an LW licence) enjoys customs duties suspension/exemption for goods deposited into its bonded warehouse under Customs Act, and under s 34(1) of the Anti-Dumping Duties Act which clearly provides that the Customs Act and Anti-Dumping Duties Act shall be construed as one.

[9] The *Hansard* of Dewan Rakyat third Parliament's second session on 6 December 1972 clearly reflects the Parliament's intention to facilitate an LMW licensee to carry out manufacturing activities on imported goods (raw material) that are not subject to customs duties in the LW.

[10] The then Finance Minister had stated as follows:

> At present, section 65 of the Customs Act already provides for warehousing facilities. All goods imported into such licensed warehouses are not subject to customs duties until they are released from bond. The proposal now is to allow manufacturing activities to be carried on as well. To this extent, customs facilities to be made available in such warehouses will be comparable to those obtainable in a free trade zone. The proposed customs facility will not only provide a further incentive to the growth of export orientated industries, it will also encourage the dispersal of industries away from the major urban areas, thereby bringing employment opportunities to our people in the smaller towns and the rural areas.

[11] Therefore, it is clear the Parliament's intention in creating LMW licences is to encourage and incentivise export oriented industries.

[12] It must be noted that all LMW licensees now automatically possess a LW licence as stated in s 65A(1A) of the Customs Act. The appellant in the present appeal possessed both LMW licence and LW licence for years 2019 and 2020.

[13] Section 17A of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) provides that regard must be given to the purpose underlying the Act:

> 17A Regard to be had to the purpose of Act
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the act or not) shall be preferred to a construction that would not promote that purpose or object.

[14] Therefore, it is my respectful view that the interpretation of the relevant provisions under the Customs Act must conform with Parliament's intention to incentivise and encourage export activities.

[15] Having read the definition of LW under s 2(1) of the Customs Act together with the meaning of 'durable goods', it is clear that the appellant as a LW licensee is allowed to warehouse dutiable goods without paying the customs duty first.

[16] Section 2(1) of the Customs Act defines LW as follows:

> 'licensed warehouse' means a warehouse or other place licensed for the warehousing of dutiable goods under section 65.

[17] 'Dutiable goods' is further defined under s 2 of the Customs Act as:

> 'dutiable goods' means all goods subject to the payment of customs duty and on which such duty has not yet been paid.

[18] 'Customs duty' is defined under s 2(1) of the Customs Act to include anti-dumping duty imposed by or under the Anti-Dumping Duties Act:

> '*customs duty*' means any import duty, export duty, surtax surcharge or cess imposed by or under this Act, any *countervailing duty or anti-dumping duty imposed by or under the Countervailing and Anti-Dumping Duties Act 1993 [Act 504]*, any safeguard duty imposed by or under the Safeguards Act 2006 [Act 657] and includes any royalty payable in lieu of an export duty under any written law or a contract, lease or agreement to which the Federal Government or the Government of any State is a party or to which such Government has consented. (Emphasis added.)

[19] Further, reg 50 of the repealed Customs Regulations 1977 which is applicable for the year 2019 and reg 31(b) of the Customs Regulations 2019 which is applicable for the year 2020 provide that if customs duties had been paid, the Taxpayer is no longer allowed to store the stainless-steel plates in its LW.

[20] Regulations 31(b) and 50 of the Customs Regulations 2019 read as follows:

> 31 Duties of licensee under section 65 of the Act
>
> Any person who has been granted license to operate a warehouse under section 65 of the Act —
>
> (a) Shall ensure that the goods deposited are removed from the warehouse within the period specified in the license;
>
> (b) Shall not store any goods which customs duty has been paid, or not receive back into the warehouse any dutiable goods which have previously been removed, whether for export or otherwise, without obtaining the approval in writing from the proper officer of customs.
>
> Regulation 31(b) of Customs Regulations 2019, with effect from 1.1.2020 (applicable for year 2020)
>
> The licensee shall not —
>
> (a) Store on the licensed premises goods upon which the duty has been paid; or
>
> (b) Receive back into the licensed premises any dutiable goods which have previously been removed, whether for export or otherwise,
>
> Without first obtaining the permission in writing of the proper officer.
>
> Regulation 50 of Customs Regulations 1977 (applicable for 2019)

[21] I find that the Customs duties suspension is consistent with and reflected in the following:

(a) the Custom's website on licensed warehouse states that the payment of duty (*duti*) and taxes (*cukai*) for dutiable goods warehoused in LW is deferred until the goods are released for home consumption or re-exported; and
(See: encl 13 p 64)

(b) the MITI's website on LMW which states that raw materials and components warehouse in the LW, used directly in the manufacturing of approved goods are exempt from 'customs duty'.
(See: encl 13 p 67).

[22] Further, as an LMW licensee, the appellant also enjoys customs duties exemption under para 2(1) and item 85 of the Schedule to the Customs Duties (Exemptions) Order 2017.

[23] Reading para 2(1) and item 85 to the Schedule of the Customs Duties Exemption Order, it is clear that LW and LMW licensees are exempted from the payment of customs duty.

[24] Based on the foregoing, the legislations, including the Customs Act, Anti-Dumping Duties Act, Custom Duties Exemption Order, Customs Regulations 1977, and Customs Regulations 2019, clearly provide that the licences are entitled to suspension/exemption from customs duties, which extend to anti-dumping duties.

[25] Therefore, it is evident that the appellant as an LMW licensee enjoys suspension from customs duties under the Customs Act and exemption from customs duties under the Customs Duties Exemption Order.

CUSTOMS CANNOT AMEND THE EXPRESS SUSPENSION/EXEMPTION GIVEN BY LEGISLATION THROUGH LETTERS

[26] The court is of the view that Customs is bound by all written laws. It cannot arbitrarily rewrite the law by its letters and disallow the appellant from the anti-dumping duties exemption from which it has been exempted by the MOF in the exercise of its statutory discretion.

[27] The Customs' attempt to remove anti-dumping duties from customs duties suspension/exemption entitled by LW and LMW is in clear breach of Parliament's intent as set out in the express language of s 2(1) of the Customs Act.

[28] It must be noted that Parliament does not legislate in vain. Every word appearing in an Act must bear some meaning.

[29] The Federal Court in *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1996] 2 MLRA 194; [1997] 1 CLJ 636; [1997] 1 AMR 997 held that:

> *The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases*. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. (Emphasis added.)

[30] In *Ketua Pengarah Hasil Dalam Negeri v Firgos (M) Sdn Bhd* [2014] 1

MLJ 701; [2013] MLRHU 876; [2014] 8 CLJ 943; [2014] 1 AMR 176, Zaleha bt Yusof J (as she then was) held that:

> [11] With due respect, I cannot agree with this line of submission. The words 'existing business' found before the words 'in respect of manufacturing or processing of a product' *must be read together as a whole*, so that the expression 'existing business in respect of manufacturing or expression of a product' is the more probable expression which is consistent with the intention of the Legislature in enacting para 8(a) of Schedule 7A. Refer to *Metacop Development v Ketua Pengarah Hasil Dalam Negeri* (Judicial Review Application No R2-25-389-2009). *If Parliament had intended reinvestment allowance to be restricted only to 'production area', then Parliament would have surely specified this clearly in Schedule 7A. I agree with the respondent that by imposing the condition of 'production area' to the meaning of 'manufacturing', the appellant had clearly acted ultra vires, illegally and without jurisdiction as such was never the intention of Parliament. The appellant cannot be allowed to usurp the role of Parliament by coining its own definition of 'manufacturing' and drafting its own law*. (Emphasis added.)

[31] Further, in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265; [2004] 1 MLRA 137; [2004] 4 AMR 202, the Federal Court held:

> [83] In my judgment s 17A has no impact upon the well-established guidelines applied by courts from time immemorial when interpreting a taxing statute. Section 17A and these guidelines co-exist harmoniously for they operate in entirely different spheres when aiding a court in the exercise of its interpretive jurisdiction. *The correct approach to be adopted by a court when interpreting a taxing statute* is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v Inland Revenue Commissioner* [1971] AC 739:
>
> > *First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices*. As Turner J said in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182 at p 208, moral precepts are not applicable to the interpretation of revenue statutes.
> >
> > Secondly, '... *one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used*.' Per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 at p 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v Regeim* [1945] 2 All ER 499; , [1946] AC 119. *Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted*.
> >
> > Fourthly, *the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction*. (Emphasis added.)

[32] Further, it is clear from the *Hansard* that Parliament intended to suspend/exempt customs duties on all goods imported into LW and LMW so as to serve as an incentive for the growth of export-oriented industries.

[33] I am of the view if Parliament had intended to exclude anti-dumping duties from the exemption, it would have amended the definition of 'customs duty' under s 2(1) of the Customs Act to reflect such intention given that s 2(1) of the Customs Act was in fact amended in the year 2006 by Customs (Amendment) Act 2006 to include safeguard duties.

[34] Based on the above, I find that the tribunal had made an error in holding that s 2(1) of the Customs Act is irrelevant in ascertaining if the stainless-steel plates are suspended/exempt from anti-dumping duties given that:

(a) s 2(1) of the Customs Act clearly defines 'custom duty' to include 'anti-damping duty imposed by or under the Anti-Dumping Duties Act'; and

(b) Customs' purported condition in its letters is inconsistent with Parliament's intention to establish an LMW facility to incentivise and encourage export-oriented industries.

[35] Therefore, it is clear that it is the Minister's prerogative to decide the scope of the customs duties exemption given to LW and LMW licensees under the Customs Duties Exemption Order, and not that of Customs.

[36] Evidently, the Customs Duties Exemption Order is enacted by the Minister in the exercise of its power conferred by Parliament under s 14(1) of the Customs Act and the Customs Duties Exemption Order only comes into effect on 3 January 2018.

[37] The Federal Court in *Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals* [2017] 2 MLJ 421; [2017] 2 MLRA 595 held that administrative policy cannot override legislation when it said as follows:

> [122] As has been held by the Federal Court in the case of *Palm Oil Research and Development Board Malaysia*, it is a well settled principle that a provision in a statute conferring power on a member of the Executive to enact subsidiary legislation, particularly one that imposes a financial levy or charges upon any section of the public, must be construed strictly. *Despite the legal improbability of a subsidiary legislation rising above that of its parent Act, hierarchical requirement demands that an administrative policy may not rise above a subsidiary legislation; that hierarchical requirement therefore must be safeguarded* (*Kerajaan Malaysia v Wong Pot Heng & Anor* [1997] 1 MLJ 437; [1996] 2 MLRA 433; [1997] 2 CLJ 188; [1997] 1 AMR 850). Peh Swee Chin FCJ at p 437 in the latter case had occasion to state:

> *Any subsidiary legislation is in effect a transfer of power from Parliament to some other authority, eg from the Administration with the executive authority of Malaysia vested in the Cabinet, down to any local authority. In order to protect the authority, dignity and standing of Parliament and at the same time, the man in the street, safeguard for such subsidiary legislation and courts are part of such safeguards*. (Emphasis added.)

[38] Based on the above, it is clearly the Minister who is empowered under the Customs Act to decide the type of customs duties qualified for exemption and there is no evidence that the Minister has delegated such power to Customs under the Delegation of Powers Act 1956.

[39] The tribunal clearly committed an error of law in holding that the Customs could, by way of the Customs circular, impose a legal condition that overrides the statutory exemption given to LW and LMW licensees from anti-dumping duties.

CUSTOMS CIRCULAR AND LETTER TO FMM ARE MERE INTERNAL GUIDELINES

[40] It is to be noted the Customs circular merely states that because the import duty exemption given to companies with LMW status is based on a Custom Duties Order, which was in effect then, the duties imposed under the Anti-Dumping Duties Act are, therefore, not exempted. The BOD was issued to the appellant on 27 January 2021 based on the Customs circular.

[41] Clearly, the Customs circular merely contains Customs' own interpretation of the relevant provisions. It does not purport to impose a 'legal condition' on all LMW companies; the word *syarat* or condition appears nowhere in this letter.

[42] The tribunal erred in law by holding that the Customs circular is a valid legal condition imposed by Customs on the appellant which restricts them from enjoying anti-dumping suspension/exemption. Further, I find that the letter, which the Customs relied on to impose the purported condition is not issued pursuant to any express provision of the Customs Act.

[43] The Customs further contends that this purported condition had been communicated to the appellant through the letter to FMM.

[44] I am of the view that the letter to FMM is mere internal guidance to the Customs and internal ruling has no force of law.

[45] In *Multi-Purpose Holdings Berhad v Ketua Pengarah Hasil Dalam Negeri*

[2006] 2 MLJ 498; [2006] 1 MLRA 40; [2006] 1 CLJ 1121 the Court of Appeal held as follows:

> [13] Adopting the approach that commends itself, I am of opinion that the requirement of which the proviso speaks refers to a requirement imposed by law. So, it is incumbent on revenue to point to a written law which requires an agreement such as the one in the present instance to have the approval of Government or an authority or committee appointed by the Government. Counsel for revenue frankly and correctly conceded that there is no such law. *There was a faint suggestion by counsel for revenue that the FIC guidelines applied to this case. But, as my learned brother Arifin Zakaria JCA pointed out in response, the FIC guidelines are not law*. See, *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors* [1979] 2 MLJ 224; [1979] 1 MLRA 173, where Wan Hamzah J said:
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> > *The guidelines were issued not pursuant to any power given by law and in my opinion, they have no force of law* ... (Emphasis added.)

[46] Further, on the same issue, I have decided in *Transocean Drilling Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2022] MLJU 2541; [2022] MLRHU 2089; [2022] 1 LNS 2438, as follows:

> [44] In the instant case, I find that although the *Accompany Notes and Reminder to Form C for YAs 2011 and 2012 advised taxpayers to file their tax returns based on audited accounts, it was merely a best practice or a guide which had not been made mandatory by the ITA at the material time*.
>
> [45] Furthermore, *it must be noted that a guideline and internal ruling by the IRB merely acts as a guideline and is not legally binding*.
>
> (See: *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformers Manufacturer Sdn Bhd* [2012] MSTC 30-039 and *Multipurpose Holdings Berhad v Ketua Pengarah Hasil Dalam Negeri* [2006] 2 MLJ 498; [2006] 1 MLRA 40; [2006] 1 CLJ 1121.) (Emphasis added.)

[47] Given that the letters are mere internal guidelines and have no force of law, I am of the view that the Customs may not rely on the Customs' letters to impose the purported condition on the appellant.

THE LETTERS CANNOT IMPOSE LEGAL CONDITIONS ON THE APPELLANT

[48] It is to be noted that the BOD was issued by the Customs on the basis that the appellant had committed an offence under s 133(1)(a) of the Customs Act.

[49] This court view that Customs cannot by way of a Customs circular/a letter to FMM create a legal condition, the breach of which attracts a criminal sanction under s 133(1)(a) of the Customs Act. Any finding to the contrary

would create a dangerous implication that the Customs are empowered to play the role of a legislature and create conditions that would result in penal sanction.

[50] In *Transocean Drilling* I have decided that the Inland Revenue Board cannot create a criminal offence under s 112(1) of the ITA for non-filing of a tax return through the use of Accompanying Notes and Reminder in the tax return:

> [24] It is trite that a penal statute should be strictly construed in favour of the subject. Therefore, since s 112(3) of the ITA being premised upon the commission of a criminal offence under s 112(1) of the ITA and which imposes penalties, it should be strictly interpreted.
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> [33] However, at paras 10.8–10.14 of the case stated, the SCIT held that para 2(B) of the Accompanying Notes (*Nota Iringan*) and the 'Reminder' (*Peringatan*) in the Form C, which reminds taxpayer to compute taxes based on audited account, has imposed a legal requirement.
>
> [34] *The implication of this ruling is that the respondent could by the mere act of issuing 'Nota Iringan' and 'Peringatan', create a criminal offence under s 112(1) of the ITA*.
>
> [35] I am of the view that the SCIT erred in holding that the enactment of s 77A(4) of the ITA was intended only to state clearly, the preexisting legal requirement to file tax returns based on audited account. (Emphasis added.)

[51] Further, I noted that neither the Customs circular nor the letter to FMM were addressed or sent to the appellant. In fact, the tribunal's finding is inconsistent with oral evidence given by Custom's own witness, who testified before the tribunal that she is not sure whether the purported condition had ever been communicated to the appellant.

> Q: Adakah puan setuju bahawa sebelum audit yang dibuat oleh pihak puan pada tahun 2020 ke atas Perayu, surat Kastam bertarikh 3.11.2016 dan 9.12.2016 ini tidak pernah dihantar secara terus kepada pihak Perayu?
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> A: Tidak pasti.

(See: encl 7, p 2, 298 @ 2, 324: AIS of MCY, exh MCY28; notes of proceedings at tribunal dated 19 May 22.)

THE PURPORTED CONDITION IS NOT IN THE LICENSES

[52] Section 65(2) of the Customs Act for LW licence provides:

> (2) Any such licence shall be for such period and subject to such *conditions as the Director General in each case may specify in the licence*. (Emphasis added.)

[53] Section 65A(2) Customs Act for LMW licence provides:

> (2) Any such licence shall be for such period and subject to such *conditions as the Director in each case may specify in the license*. (Emphasis added.)

[54] Based on the above sections, I am of the view that the Customs is required to specify the conditions applicable in the licence issued to the appellant and not in a separate document, whether the Customs circular or letter to FMM.

[55] I find support for my view by referring to the case of *Seruntum Maju* where the Court of Appeal considered s 65D(2) of the Customs Act which is *pari materia* to ss 65(2) and 65A(2) in present appeal.

[56] The Court of Appeal held that the phrase 'specify in the licence' means 'to mention explicitly, definitely and certainly in the licence' when the licence is issued when it held as follows:

> [27] By reading 'specify in the licence' based on its natural meaning, it would naturally mean: '*to mention explicitly, definitely and certainly in the licence'. In order words, no conditions can be imposed after the licence had been issued as this goes against the principle of stating it explicitly, definitely and certainly*.
>
> [36] The principles cited in the above authorities showed that *when a provision expressly provides that conditions shall be specified in the licence, it means that the conditions must be granted when the licence was issued. No conditions can be granted after that*. (Emphasis added.)

[57] Applying *Seruntum Maju* to the present appeal. I am of the view that the purported condition ought to be mentioned explicitly, definitely and certainly in the licence and not through the Customs circular.

[58] I find that the present appeal is even worse than *Seruntum Maju* as the purported condition was not sent to the appellant but was addressed and circulated to a long list of Customs departments within Customs. In fact, the appellant only became aware of the Customs circular for the first time when it received Customs' notice of assessment dated 27 January 2021 which attached the Customs circular.

[59] Therefore, based on the above, I view that it was wrong for the tribunal to hold that the purported condition in these letters had been validly imposed on the appellant, when the appellant was never informed of such purported condition at the time that the licences were issued and could not possibly have any prior knowledge of it.

[60] The Customs on the other hand relied on generic statements in the

Explanatory Note of the appellant's LMW and LW licences and *Lampiran* C, which is found on Customs' website, to contend that the letters, which contain the purported conditions, are issued pursuant to ss 65(2) and 65A(2) and have been incorporated into the licences.

[61] However, I find that *Lampiran* C can only be found on Customs' website, it is not issued or given to the appellant. Nothing in the *Lampiran* C or the Explanatory Note of the LMW licence states that LMW licensees do not enjoy anti-dumping duties suspension/exemption.

(See: appellant's affidavit in support, exh MCY11.)

[62] Based on the principles that taxing legislations must be construed strictly and against the revenue in the Court of Appeal case of *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428; [2005] 2 MLRA 335; [2005] 4 CLJ 810 only conditions that are specified in the licences shall be applicable and the appellant shall not be subject to any other conditions that are not specified in the licences and be treated as committing a criminal offence for not complying with the purported conditions.

[63] Given that Customs cannot be allowed to create legal conditions that will result in criminal sanctions and considering that the purported legal condition is not contained 'in' the licenses, it is clear that Customs' disallowance of the appellant's entitlement to suspension/exemption of anti-dumping duties is unreasonable, arbitrary and ultra vires.

CONCLUSION

[64] Premised on the aforesaid reasons, I am of the view that the tribunal's decision is tainted with error of law, irrationality and/or unreasonableness that warrant the intervention of the court.

[65] The legislative intent of Parliament to suspend/exempt anti-dumping duties for LW and LMW licensees is clearly expressed in the legislations and the *Hansard*.

[66] The Customs, as an executive arm of the Government, and the tribunal, as a quasi-judicial body, have a duty to uphold and give effect to the intention of Parliament. Any deviation from this duty undermines the integrity of the legislative process.

[67] As such, I allowed the appellant's OS (encl 1) with costs of RM1,000 without the allocator fee.

A *Appellant's OS allowed.*

Reported by Ashok Kumar

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